No. 08-1097

In the Supreme Court of the United States

DAVID P. ADAM, ET AL., PETITIONERS

v.

KEN SALAZAR, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's judgment that the Secretary did not violate the Civil Service Reform Act, 5 U.S.C. 7701 *et seq.*, or engage in age discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is unreported. The relevant opinions and orders of the district court (Pet. App. 16a-66a; App., *infra*, 1a-23a, 24a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2008. A petition for rehearing was denied on November 19, 2008 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on February 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are 14 former employees of the Geologic Division of the United States Geological Survey

(USGS), which is an agency within the United States Department of the Interior. In 1995, petitioners were released from the agency due to a reduction in force (RIF). Pet. 3. Petitioners allege that they were released because of age discrimination.

a. In 1993, the USGS formed a Transition Team to coordinate the agency's transition under the new presidential administration. Pet. App. 18a. The Transition Team prepared a report on the agency's future, which stated that "[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce that has limited the organization's financial flexibility and restricted the influx of new ideas and talents." *Id.* at 18a-19a. The report also stated that "[a]n aging workforce is a critical problem that must be addressed earnestly and creatively before any strategic recruitment plan can be implemented." *Id.* at 19a.

In 1994, Dr. Gordon Eaton was appointed the new Director of the USGS. Immediately after his appointment, Dr. Eaton gave speeches at the Geologic Division's three major centers. In the speeches, Dr. Eaton referred to a poster that showed a dinosaur with the caption, "Which is scarier, change or extinction?" Pet. App. 20a. He also told the following riddle, which he had heard from members of the Transition Team: "What is the difference between Jurassic Park and the Geological Division of the Geologic Survey? * * * [O]ne is an amusement park filled with dinosaurs and the other is a movie." *Id.* at 20a-21a. After saying that, Dr. Eaton, who was then sixty-five years old, *id.* at 20a, said, "So those of you in my generation in the Geology Division, take that," *id.* at 21a. Dr. Eaton also lamented the lack of "bright new young active minds" in the agency. *Ibid.*

In the years prior to the 1995 RIF, the Geologic Division was facing a "challenge of limited financial resources." Pet. App. 27a. "[I]ncreases in funding for the science programs had not kept pace with increases in salary commitments, leading to declining availability of funds for operating expenses, or funds to purchase the equipment and supplies necessary to conduct the research that was the Geologic Division's mission." *Ibid.* By 1994, there were calls within the Geologic Division for "a RIF to reduce [its] salary commitments." *Id.* at 28a. In 1995, Dr. Eaton "made the decision to go forward with the RIF" after the House Appropriations Committee informed the Geologic Division that its budget would be significantly reduced. *Id.* at 29a. After that announcement, the Geologic Division held briefings on the RIF at its Menlo Park center. Employees received a flyer on the briefings that included a cartoon of a dog telling his mother, "You gotta help me, Mom * * *. This assignment is due tomorrow and Gramps doesn't understand the new tricks." *Id.* at 29a-30a. The flyer was prepared and distributed by Cynthia Ramseyer, a USGS secretary.

Neither the Transition Team nor Dr. Eaton nor Ms. Ramseyer was directly involved in the RIF.

b. The RIF was governed by federal regulations promulgated pursuant to the Civil Service Reform Act (CSRA). See 5 C.F.R. Pt. 351. In accordance with the regulations, the USGS carried out the planning and implementation of the RIF in several distinct stages. First, the agency had to categorize each position within the agency into "competitive levels." See 5 C.F.R. 351.403(a)(1) (1996). Each competitive level included positions that were generally interchangeable, "so that [the] agency may reassign the incumbent of one position

to any of the other positions [within the competitive level] without undue interruption." *Ibid.*

To ensure that all positions were assigned to proper competitive levels, the agency relied on "peer panels" of subject matter experts to review each position and place it in an appropriate competitive level. Pet. App. 33a. These panels "did not consider or discuss the ages of the incumbents of the positions." *Id.* at 34a.

The agency next developed staffing plans to determine what positions were needed to adequately staff the agency, keeping in mind the agency's financial constraints. Pet. App. 34a-36a. The initial staffing plans were developed by "Program Councils," which consisted of panels of management level employees in each of the Geologic Division's program offices. *Id.* at 34a-35a. These staffing plans were then modified by a central committee of 20 agency employees. *Id.* at 35a-36a. Age was not a factor in these decisions because the staffing plans were "unpopulated," meaning that they focused on specific positions, and not individual employees. *Id.* at 35a.

The agency next filled the staffing plans with particular employees from the competitive levels. When it had created the competitive levels, the agency had ranked incumbent employees holding positions within each level by a set of "retention factors" such as tenure, veterans preference, and years of government service. Pet. App. 31a. The staffing plans were "populated" according to those rankings, and "the employees whose positions were not placed on the staffing plans were released from their competitive levels." *Id.* at 37a. "There is no evidence" that this process accounted for "employees' ages." *Id.* at 36a.

Even when an employee had been released from his or her competitive level, the employee could under certain conditions take a lower-ranking job in a different competitive level and displace an employee who would otherwise be retained. See 5 C.F.R. 351.701 (1996). In determining whether specific employees were permitted to exercise such "assignment rights," the agency turned to a panel of subject matter experts, comprised of senior employees within the Geologic Division who were "chosen for their broad range of expertise and because they were highly respected." Pet. App. 38a. There was "no evidence that any of the [subject matter experts] considered or discussed the age of employees when they evaluated assignment rights." *Id.* at 40a.

After the staffing plans had been created, the agency learned that its funding would not be cut as drastically as it had feared. Pet. App. 40a. The agency therefore convened a committee to add certain positions back into the staffing plans. *Id.* at 40a-41a. There was "no evidence that age was considered or discussed" by this committee. *Id.* at 41a.

Petitioners were released from the agency as a result of the RIF. Pet. 3.

2. Pursuant to the Civil Service Reform Act, 5 U.S.C. 7701 *et seq.*, qualified federal employees may appeal adverse employment decisions to the Merit Systems Protection Board (MSPB or Board). If the employee alleges that the adverse action was unlawful for discriminatory and nondiscriminatory reasons, the appeal is designated a "mixed case." 5 U.S.C. 7702. While petitions for review of MSPB actions are ordinarily filed in the Court of Appeals for the Federal Circuit, 5 U.S.C. 7703(b)(1), in a "mixed case" judicial review of the final Board order must lie in a district court, see, *e.g.*, *Hayes*

v. *United States GPO*, 684 F.2d 137, 139-140 (D.C. Cir. 1982). The district court must review the discrimination claims de novo, 5 U.S.C. 7703(c), but the Board's conclusions with respect to the nondiscrimination claims are reviewed on the administrative record and are accorded significant deference, *ibid.*

Petitioners brought a "mixed case" against the agency before the MSPB. As is relevant here, they alleged age discrimination, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a(a), which provides that "[a]ll personnel actions affecting employees * * * who are at least 40 years of age * * * shall be made free from any discrimination based on age." Petitioners also alleged several nondiscriminatory violations of the CSRA. 5 U.S.C. 7701 *et seq.* After a 91-day hearing, the MSPB sustained the agency's actions. App., *infra* 2a. It held that the agency had bona fide financial and reorganizational reasons for conducting the RIF, that the RIF was carried out in accordance with applicable regulations under the CSRA, and that each petitioner was properly separated from service. App., *infra*, 27a.

3. Petitioners then commenced suit against the Secretary of the Interior in district court in the Northern District of California, seeking review of, *inter alia*, the MSPB's decisions on their CSRA and age discrimination claims. The district court dismissed petitioners' CSRA claims on summary judgment. The court reviewed those claims under the deferential standard of review provided by 5 U.S.C. 7703(c), and found that the MSPB's decision was not arbitrary or capricious and was supported by substantial evidence. App., *infra*, 28a-49a.

The district court recognized that under 5 U.S.C. 7703(c), the MSPB's decision as to the discrimination

claims had to be reviewed de novo. App., *infra*, 3a. The court permitted those claims to proceed to trial. *Id.* at 4a-20a, 22a. After a two-week bench trial, the district court ruled in favor of the government on petitioners' discrimination allegations. As to petitioners' disparate treatment claims, the district court found that although petitioners introduced some evidence that the USGS's culture was "tainted with age-based discriminatory animus," there was no evidence that any of the relevant decisionmakers who participated in the RIF process were motivated by such animus or that any of the actions taken against petitioners was the result of discrimination. Pet. App. 60a-61a. As to each of the petitioners, the district court found that the agency had "legitimate, non-discriminatory reasons for separating" them. *Id.* at 61a; see also *id.* at 42a-57a (detailing the agency's non-discriminatory reasons for separating each petitioner).

For example, the court concluded that petitioner David Adam was separated not because of age discrimination, but because his particular specialty was no longer required. Pet. App. 56a-57a. Dr. Adam worked as a palynologist for the Global Change and Climate History Program, and specialized "in the climate history of the upper Cenozoic." *Id.* at 57a (citation omitted). He had also "designed a state-of-the-art pollen extraction laboratory with a refrigerated core storage unit" for the agency's Menlo Park offices, where he worked. *Ibid.* As the district court concluded, the agency "did not have enough positions for all of the people conducting such research." *Ibid.* Moreover, the agency "decided to use the long-term core storage facility in Denver, rather than the one in Menlo Park" because it was more established and had a permanent staff. *Ibid.* Thus, "[c]onsidering these factors, the Program Council decided not to

include a palynology position in Menlo Park on the staffing plan." *Ibid.* Later, a separate panel of subject matter experts determined that Dr. Adam was not entitled to retreat to a different position. *Ibid.* The court thus concluded as a factual matter that there was "no evidence that Dr. Adam's age was a factor" in either of these decisions. *Ibid.*

As to petitioners' disparate impact claims, the district court concluded that petitioners had not made a prima facie case of discrimination. While "[o]lder workers were more likely to have been negatively affected by the RIF than younger workers," that result did not by itself "suggest that age played a causal role in determining which employees were affected by the RIF, because it d[id] not account for other factors that may have influenced which employees were affected by the RIF." Pet. App. 41a. In particular, the court concluded that petitioners' proffered statistical evidence was flawed because it failed to account for the type of work an employee performed. *Id.* at 41a-42a. Moreover, the district court found that petitioners had failed to "isolate and identify the specific employment practice responsible for the disparate impact." *Id.* at 63a. The district court held that petitioners could not point to the entire RIF as a single employment practice. *Ibid.* Instead, the RIF was better conceived as a series of separate decisions made by the agency; for each of those decisions, there was no evidence of age discrimination. *Ibid.* The court further concluded that even if petitioners had made a prima facie case, they "would still not prevail." *Id.* at 64a. The agency had offered "a legitimate business reason for conducting the RIF"—namely, cost-cutting—and petitioners had not "identified any other course of action that [the agency] could have taken that

would have reduced the Geologic Division's salary obligations enough to generate the operating funds that it needed to meet its programmatic goals." *Ibid.*

4. The court of appeals affirmed in relevant part in an unpublished memorandum opinion. Pet. App. 1a-15a. The court rejected petitioners' contention that the district court should have applied "mixed-motive analysis" to their disparate treatment claims. *Id.* at 5a-6a. The court explained that mixed-motive analysis was inappropriate because the district court had found that the relevant decisionmakers in the RIF process had not acted according to any discriminatory animus. *Id.* at 6a.

The court of appeals also rejected petitioners' contention that they had made a prima facie case of discrimination on their disparate impact theory. The court observed that "analyzing the impact of a generalized policy is not specific enough," Pet. App. 7a (internal quotation marks omitted), and affirmed the district court's finding that "the reduction in force could be broken down into different elements and that statistical analysis of the reduction in force as a whole was thus insufficient to meet [petitioners'] burden." *Ibid.* The court of appeals acknowledged that the district court's application of the "business necessity" test was erroneous in light of this Court's decision in *Meacham* v. *Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008). Pet. App. 13a n.2. But the court of appeals judged that error harmless because the district court had correctly held that petitioners had not made a prima facie case of disparate impact. *Ibid.*

Finally, the court of appeals rejected petitioners' argument that the district court applied deferential review to their discrimination claims. The court of appeals concluded that the district court "properly separated the

CSRA claims from the discrimination claims and properly reviewed the discrimination claims de novo," as required by 5 U.S.C. 7703. Pet. App. 9a.

Judge Reinhardt dissented in part. Pet. App. 14a-15a. He would have held "that where there is irrefutable evidence of an officially sponsored culture of discrimination in a workplace, it is not necessary to demonstrate that the individual who ultimately undertook the challenged adverse employment action was motivated to do so by his own disciminatory animus." *Ibid.* He would therefore have "reach[ed] the merits of [petitioners'] mixed-motive claim and [found] discrimination in violation of the ADEA." *Id.* at 15a. He otherwise agreed with the majority's disposition of the remaining claims, including the CSRA and ADEA disparate impact claims. *Ibid.*

ARGUMENT

The petition for a writ of certiorari should be denied. The court of appeals' holding is correct, fact-bound, and does not implicate any significant questions of law or split of legal authority. None of petitioners' narrow challenges to the court of appeals' decision warrants review.[1]

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[1] Petitioners also may have failed to perfect their appeal to the court of appeals. The district court entered a final judgment on September 30, 2004. Under Fed. R. App. P. 4(a)(1)(B), petitioners were required to file a notice of appeal within sixty days, by November 29, 2004. But the district court docket indicates that petitioners filed the notice of appeal one day late, on November 30, 2004. The Ninth Circuit Appellate Commissioner issued a report and recommendation concluding that petitioners' notice of appeal had been timely received, though in the wrong division of the district court. The government objected to the report and recommendation on the ground that petitioners had failed to provide tangible proof of any timely filing. The court of appeals,

1. Petitioners assert (Pet. 11-12) that the court of appeals' disparate-impact ruling contradicts this Court's decision in *Meacham* v. *Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008). That is incorrect.

In a disparate-impact suit under the ADEA, an employer may assert as an affirmative defense that the challenged employment decision was "based on reasonable factors other than age." 29 U.S.C. 623(f)(1). In *Meacham*, this Court held that the burden of persuasion for this defense lies with the employer. 128 S. Ct. at 2400. In doing so, the Court noted that the "business necessity" defense that applies in the Title VII context "should have no place in ADEA disparate-impact cases." *Id.* at 2404. According to petitioners, the judgment below was inconsistent with *Meacham* because the court of appeals "erroneously affirmed the district court's placement of the burden to prove 'business necessity' on the Petitioners." Pet. 13.

Petitioners' suggested disposition—vacatur and remand in light of *Meacham*, Pet. 11—is unnecessary because the court of appeals addressed the relevance of *Meacham*. Pet. App. 13a n.2. Petitioners' argument also lacks merit because the court of appeals properly regarded *Meacham* as irrelevant to petitioners' disparate impact claims. *Ibid.* To show discrimination on a disparate-impact theory under the ADEA, a plaintiff must first demonstrate that a facially neutral practice has a disproportionate impact on older workers. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). If a plaintiff fails to carry that threshold burden, there is no need for the employer

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however, never resolved the dispute: it did not adopt the report of the Appellate Commissioner or address the issue of appellate jurisdiction in its opinion.

to raise an affirmative defense, and *Meacham* does not come into play.

Here, the court of appeals affirmed the district court's finding that petitioners had failed to demonstrate "a significant disparate impact on older workers." Pet. App. 6a-7a. In particular, the court of appeals found no clear error in the district court's conclusion that petitioners' statistical evidence was flawed in two important respects. First, the analysis "failed to provide any meaningful evidence because it did not take into account the type of work performed by each employee." *Id.* at 7a. Second, it "failed to isolate and identify the specific employment practice responsible for the disparate impact." *Ibid.*

Moreover, the court of appeals went on to explain that even if the district court had erred by using the business-necessity-defense framework, the error would be harmless because the district court had correctly held that petitioners "failed to establish a prima facie case." Pet. App. 13a n.2. Accordingly, there is no basis for petitioners' assertion that the court of appeals did not account for *Meacham*.

2. Petitioners also contend (Pet. 13-17) that the court of appeals erroneously required them to establish their disparate-treatment claim through only direct evidence. That is incorrect.

Before the lower courts, petitioners indicated that their disparate-treatment claim rested on a "mixed-motive" theory. In a mixed-motive case, a plaintiff need only show that discrimination "played a motivating part in an employment decision," even if there were also legitimate considerations for the decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244 (1989) (plurality opinion). The burden then shifts to the employer, which

"may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [discrimination] to play such a role." *Id.* at 244-245 (footnote omitted).

This Court has held that a Title VII plaintiff may establish a mixed-motive claim by either direct or circumstantial evidence, see *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 92 (2003), and it is currently considering whether the same rule should apply in the ADEA context, see *Gross* v. *FBL Fin. Group, Inc.*, No. 08-441 (argued Mar. 31, 2009). The government, in its amicus brief in *Gross*, argued that the ADEA should be interpreted in line with Title VII. See U.S. Amicus Br. at 20-25, *Gross* v. *FBL Fin. Group, Inc.*, No. 08-441 (Feb. 2, 2009). The Secretary thus agrees with petitioners that they were not limited to direct evidence in establishing their mixed-motive case.

Contrary to petitioners' suggestion, however, the court of appeals committed no legal error on this issue, and the Court's expected decision in *Gross* has no bearing on this case. The court below correctly recognized that, under mixed-motive analysis, the burden would shift to the employer only after the plaintiff has shown that "a protected characteristic was a motivating factor in the employment action." Pet. App. 6a (internal quotation marks omitted); see *Desert Palace*, 539 U.S. at 100-101. Because the district court, after a lengthy bench trial, found *no* evidence—direct or circumstantial—that age was a factor at all in any of the decisions affecting petitioners in the RIF, the court of appeals correctly determined that there was no reason to shift the burden to the agency. Pet. App. 6a.

Petitioners' real dispute is with the court of appeals' *factual* conclusion. They allege that "evidence contained

in the district court findings" would have "support[ed] a finding of age discrimination." Pet. 17. But the court of appeals was not obligated to accept that reading of the record; it only had to conclude that the district court's finding was not clearly erroneous, Pet. App. 6a. And in any event, the district court's finding of no discrimination is borne out by the record. Indeed, as the district court noted, the very best evidence of discrimination that petitioners could muster related to isolated incidents by people who "did not play any role in deciding whether any of the Plaintiffs would be separated during the RIF." *Id.* at 61a.

Judge Reinhardt asserted in dissent that, even in the absence of any evidence that the people involved in the RIF acted out of discriminatory animus, petitioners were entitled to judgment as a matter of law because the evidence demonstrated a "culture of discrimination." Pet. App. 14a. Although petitioners quote that dissent (Pet. 15-16), even they do not urge such a sweeping rule. Instead they suggest that the agency's discriminatory culture, coupled with alleged circumstantial evidence of discrimination in the "implement[ation]" of the RIF, was sufficient to shift the burden to the agency. Pet. 16-17. The district court, however, as the trier of fact, was entitled to make its own determination as to whether the RIF decisions here were discriminatory, and the court of appeals properly regarded the district court's findings as not clearly erroneous. Pet. App. 6a. The fact-bound nature of petitioners' argument thus warrants no further review by this Court.

3. Petitioners also argue (Pet. 18-20) that their non-discrimination CSRA claims should have been reviewed de novo by the district court. That is incorrect.

On review of a "mixed case" of discrimination and nondiscrimination claims coming from the MSPB, a district court must apply a bifurcated standard of review. For the nondiscrimination claims, it must apply deferential review of the administrative record. 5 U.S.C. 7703(c). For the discrimination claims, it must apply de novo review. *Ibid.*

The district court in this case followed that scheme. It reviewed petitioners' nondiscrimination claims deferentially and rejected them on summary judgment. App., *infra*, 28a-49a. It then held a bench trial on petitioners' allegations of discrimination. After issuing its own fact findings, it rejected those claims. Pet. App. 16a-66a.

Petitioners' contention—that the district court should also have applied de novo review to their nondiscrimination claims, Pet. 19-20—is foreclosed by plain statutory language. Section 7703(b)(2) identifies three types of discriminatory claims that may be brought before the MSPB: those arising from Title VII, the ADEA, and the Fair Labor Standards Act. 5 U.S.C. 7703(b)(2). Section 7703(c) then provides that only those claims are "subject to trial de novo by the reviewing court." 5 U.S.C. 7703(c). Any other claims, such as petitioners' nondiscrimination claims here, must be reviewed deferentially. *Ibid.*

Petitioners, citing several courts of appeals decisions, suggest that "'mixed cases' involving discrimination as well as non-discrimination * * * are not bifurcated" on review. Pet. 20-21. Those cases, however, hold only that a district court may exercise jurisdiction over an entire "mixed case." See, *e.g.*, *Hayes* v. *United States GPO*, 684 F.2d 137, 140-141 (D.C. Cir. 1982). But they do not alter the bifurcated nature of review. See *id.* at 141 (stating that an employee "may bring his entire mixed

case before the district court for review *de novo* of the discrimination claim, and review on the record of his nondiscrimination claim").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 2009

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-2094 CW

DAVID P. ADAM, ET AL., PLAINTIFFS

v.

GAIL A. NORTON, SECRETARY, U.S. DEPARTMENT OF INTERIOR, DEFENDANT

[Filed: May 31, 2002]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Gail Norton moves for summary judgment on Plaintiffs' claims that their termination from employment with the United States Geological Survey (USGS) violated the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act (Title VII). Plaintiffs oppose the motion. The issue presented by this motion is whether there is sufficient evidence in the record to establish a disputed question of fact as to whether Defendant designed and implemented the October, 1995 reduction in force (RIF) in a manner that discriminated on the basis of age, sex, national origin, and/or veteran status. The matter was heard on May 10,

2002. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants the motion in part and denies it in part (Docket #142).

BACKGROUND

On October 15, 1995, the USGS reduced its workforce by thirty-seven percent, resulting in the separation, retirement or transfer of 541 USGS employees, the demotion of 119 more, and the reassignment of 124. Declaration of Mary Dryovage (Dryovage Dec.), Ex. F. Sixteen of the individual Plaintiffs in this action were separated from service and the seventeenth Plaintiff was demoted as part of the October 15 RIF.

Each of the Plaintiffs litigated the adverse employment action taken against them in a consolidated proceeding before the Merit Systems Protection Board (MSPB). After a ninety-one day hearing, the Administrative Law Judge (ALJ) upheld the separation of the Plaintiffs against claims that 1) the RIF violated the Civil Service Reform Act (CSRA); 2) the RIF regulations were applied improperly to the individual Plaintiffs; and 3) Defendant unlawfully discriminated against Plaintiffs based on age and on age in combination with other protected characteristics. The MSPB decision was appealed to this Court. On January 27, 2000, Defendant moved for summary adjudication of the first two claims decided by the ALJ—whether Defendant's implementation of the RIF and separation of Plaintiffs violated the CSRA.

On May 17, 2001, the Court affirmed the decision of the ALJ, holding that the ALJ's conclusions were supported by substantial evidence and were not "arbitrary and capricious." *See* "Order Granting Defendant's Mo-

tion for Partial Summary Judgment, Denying Plaintiffs' Rule 56(f) Request, and Denying Motions to strike," (Partial Summary Judgments, Order) at 6, 31.

Defendant now moves for summary judgment on Plaintiffs' remaining claim for discrimination. As the Court noted in its previous order, "MSPB decisions on discrimination issues are reviewed de novo." Partial Summary Judgment Order at 6 (citing 5 U.S.C. § 7703 (c) and *Sloan v. West*, 140 F.3d 1255, 1260 (9th Cir. 1998)).

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The

substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the nonmoving party's claim. *Id.*; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

DISCUSSION

Plaintiffs argue that they have raised disputed questions of material fact sufficient to withstand summary judgment under either a disparate treatment or a disparate impact discrimination theory. The distinction between these theories of discrimination is well established.

Disparate treatment is the most easily understood type of discrimination. The employer simply treats

> some people less favorably than others because of their race, color, religion or other protected characteristics. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Claims that stress disparate impact by contrast involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate-impact theory.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (citing *Teamsters v. United States*, 431 U.S. 324, 335-336, n.15 (1977)).

A. Disparate Treatment

1. Legal Standard

"The burden on summary judgment of a plaintiff asserting disparate treatment under Title VII [or the ADEA] is . . . to establish a *prima facie* case of discrimination and, if the employer articulates a legitimate, nondiscriminatory reason for its actions, to raise a genuine factual issue as to whether the articulated reason was pretextual." *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Sischo-Nownejad v. Merced Community College*, 934 F.2d 1104, 1199-10 & n.7 (9th Cir. 1991) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

Within this framework, a plaintiff may establish a *prima facie* case of discrimination with circumstantial evidence: a plaintiff must show that he or she is a member of a protected class; that he or she was qualified for

the position he or she held or sought; that he or she was subjected to an adverse employment decision; and that he or she was replaced by someone who was not a member of the protected class or that the circumstances of the decision otherwise raised an inference of discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) (citing *McDonnell Douglas*). Once the plaintiff establishes a *prima facie* case, a presumption of discriminatory intent arises. *Id.* To overcome this presumption, the defendant must come forward with a legitimate, nondiscriminatory reason for the employment decision. *Id.* at 506-07. I f the defendant provides that explanation, the presumption disappears. See *id.* at 511; *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

In response to the defendant's offer of a nondiscriminatory reason, the plaintiff must produce either "specific, substantial evidence of pretext, *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), or some "direct evidence of discriminatory motive." *Godwin v. Hunt, Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998).

If, in order to survive summary judgment, the plaintiff puts forward evidence of pretext, that evidence must be sufficient to raise a genuine issue of material fact as to whether the reason the employer articulated is a pretext for discrimination. The plaintiff may rely on the same evidence used to establish a prima facie case or put forth additional evidence. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000); *Wallis*, 26 F.3d at 892. "[I]n deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the *prima facie* case, as well as the

other evidence offered by the plaintiff to rebut the employer's offered reasons. And, in those cases where the *prima facie* case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, plaintiff has failed to raise a triable issue of fact." *Wallis*, 26 F.3d at 890. "[T]he plaintiff 'must tender a genuine issue of material fact as to pretext in order to avoid summary judgment.'" (quoting *Steckl*, 703 F.2d at 393). The factfinder's disbelief of the defendant's proffered reason, along with the elements of the prima facie case, may "suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511.

If, in response to the defendant's showing of a legitimate, nondiscriminatory reason, the plaintiff puts forth evidence of discriminatory motive, "the plaintiff need produce very little evidence . . . to raise a genuine issue of fact." *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991). For this reason, the Ninth Circuit has instructed that district courts must be cautious in granting summary judgment for employers on discrimination claims. *See Lam*, 40 F.3d at 1564 (" [w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry' —one that is most appropriately conducted by the factfinder'") (quoting *Sischo-Nownejad*, 934 F.2d at 1111).

Plaintiffs argue that the *McDonnell Douglas* burden shifting approach should not apply here for two reasons. First, Plaintiff notes that "the *McDonnell Douglas* test is inapplicable where the Plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Plaintiffs contends that because they have presented evidence of remarks

that could be construed as discriminatory, the analytic framework applicable to mixed-motive cases should apply here. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In other words, the evidentiary burden should shift to Defendant to show that it would have taken the same adverse employment action regardless of discriminatory animus.

The Ninth Circuit has made clear, however, that the *McDonnell Douglas* framework is applicable where the plaintiff has presented some comments from the employer that could be construed as discriminatory. *See Godwin*, 150 F.3d at 1221 (sales manager's comment that "he did not want to deal with another female" sufficient to satisfy the plaintiff's evidentiary burden at the pretext stage of the *McDonnell Douglas* analysis); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001) ("small amount of direct evidence is necessary in order to create a genuine issue of material fact as to pretext"); *Chuang v. University of California Davis. Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (plaintiff's direct evidence of discrimination analyzed under pretext prong of *McDonnell Douglas* test).

The issue presented is whether Plaintiffs have presented sufficient evidence to raise a jury question on whether discriminatory animus underlay the facially neutral evaluation criteria. The burden-shifting scheme of *McDonnell Douglas* is the appropriate framework in which to analyze this question.

In addition, Plaintiffs appear to argue that under *Reeves v. Sanderson Plumbing Products. Inc.*, 530 U.S. 133 (2000) summary judgment must be denied once the plaintiff establishes a prima facie case. *Reeves*, howev-

er, did not modify the burden shifting standard previously articulated by the Ninth Circuit and summarized above. The plaintiff must establish a prima facie case and, if the employer rebuts that case by articulating a legitimate, non-discriminatory reason, the plaintiff must present direct evidence of discriminatory motive or specific circumstantial evidence of pretext. *See Godwin*, 150 F.3d at 1220-1221; *Coleman*, 232 F.3d at 1284.

2. Prima Facie Case

To make out a prima facie case of discrimination, Plaintiffs must show that they were members of a protected class who were satisfactorily performing their jobs, that they suffered adverse employment actions, and that the circumstances of the adverse action raise an inference of discrimination.

Defendant argues that Plaintiffs Hirshorn and Turrin have not established a prima facie case because they were not members of the protected class. Specifically, Plaintiffs Hirshorn and Turrin were thirty-nine years old when they were separated pursuant to the RIF on October 15, 1995. *Polstorff v. Fletcher*, 452 F. Supp. 17, 23 (D.C. Ala. 1978) ("The Age Discrimination in Employment Act provides protection for persons between the ages of 40 and 65."); Declaration of Mary Beth Uitti (Uitti Dec.), Exs. A, B. Plaintiffs contend that although Hirshorn and Turrin were not in the protected class at the time of the RIF, they entered the protected class shortly thereafter and were eligible for positions filled after the RIF. Plaintiffs contend that both the initial RIF and the refusal to allow separated employees to "bump and retreat" into other positions violated the ADEA. Plaintiffs have not cited any evidende that Defendant refused to consider Plaintiffs Hirshorn and

Turrin for qualifying jobs that became available after the RIF. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1422 (9th Cir. 1990) (refusal to transfer employee rather than layoff raises inference of discrimination only upon showing of differential treatment of employee outside the class). Consequently, there is no evidence of discriminatory treatment of Hirshorn and Turrin after they became members of the protected class. They have not, therefore, satisfied their burden of establishing a prima facie case.

Defendant does not dispute that the other fifteen Plaintiffs have established a prima facie case of age discrimination.

3. Legitimate Non-Discriminatory Reason

"A RIF is a legitimate nondiscriminatory reason for laying off an employee." *Coleman*, 232 F.3d at 1282; *see also Gianacualas v. Transworld Airlines, Inc.*, 761 F.2d 1391, 1395 (9th Cir. 1985) (general reduction in workforce as result of economic downturn constitutes "good cause" to terminate employment).

As detained in the Court's previous order, Defendant has presented evidence that the RIF was implemented for legitimate, budgetary reasons. *See* Partial Summary Judgment Order at 3, 7-9; *see also Cross v. Dept. of Transp.*, 127 F.3d 1443, 1447 (Fed. Cir. 1997) (agency may undertake cost cutting measures in anticipation of future cuts in funding). Defendant has also presented evidence that the RIF was designed and implemented without discriminatory intent and that it compiled with governing procedures. *See* Partial Summary Judgment Order at 10-12 (citing Administrative Record (AR) 919, 15292-93, 17792, 17380). This evidence satisfies Defendant's burden of showing a legitimate nondiscriminatory

reason for the adverse employment actions. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996) (employer satisfied "burden by offering some evidence that a [*sic*] downturn in work required some layoffs, and that it used a combination of factors, including performance, technical qualifications, and seniority, in deciding whom to discharge").

At this point in the *McDonnell Douglas* analysis, the presumption of discriminatory intent "drops out of the picture." *Wallis*, 26 F.3d at 889 (quoting *Hicks*, 509 U.S. at 511). The burden shifts back [*sic*] Plaintiffs to "produce enough evidence to allow a reasonable factfinder to conclude" that Defendant's proffered explanation is false or that the true reason for the discharge was discriminatory. *Nidds*, 113 F.3d at 918.

4. Discriminatory Intent/Pretext

Plaintiffs may satisfy their burden by presenting either evidence of Defendant's discriminatory animus or evidence that the RIF was not legitimate or nondiscriminatory. Plaintiffs have presented [*sic*] *evidence* that falls into both categories. First, Plaintiffs have proffered comments from the director of the USGS and from those involved in implementing the RIF from which Plaintiffs contend a jury could infer discriminatory animus. In addition, Plaintiffs contend that the RIF was implemented in a manner biased against employees over the age of forty.

a) Discriminatory Intent

Dr. Gordon Eaton became the Director of USGS in early 1994 at the age of sixty-six. Prior to his appointment to this position, his supervisor, former Secretary of the Interior Bruce Babbit, expressed to Dr. Eaton his

concerns about the direction of the USGS. According to Dr. Eaton, Secretary Babbit believed that the USGS had been inadequately "responsive to change in terms of national need [and] societal concerns." Dryovage Dec., Ex. K 11:8-10. Secretary Babbit was also concerned that "there had been inadequate development of . . . leadership among the young people" in the organization. *Id.* at 11:14-16. Dr. Eaton set out to address these concerns. *Id.* at 11:25-12:2.

Within two weeks of being appointed, Dr. Eaton visited the three main USGS centers, located in Menlo Park, California; Denver, Colorado; and Reston, Virginia. At each visit, he gave a presentation to the staff that lasted between forty-five minutes and one hour and was followed by a question and answer period. Prior to the Menlo Park meeting, Dr. Eaton was given a poster, which he described to the Menlo Park staff during his presentation. The poster showed a bewildered looking dinosaur with the caption, "Which is scarier, change or extinction." *Id.* at 70:10-15. In his second meeting, in Denver, Dr. Eaton again described the poster to the staff and, in addition, made the following comment in reference to the challenges facing the USGS:

> The transition team . . . visited in a number of different places and along the way they heard some things from members of the Geologic Division which sounded to them like intransigency and an unwillingness to change even an unwillingness in fact to embrace it, and while that clearly is not true for the whole Geologic Division *I would have to argue that some of the people that I know and love the most that are of my generation within the organization may have been the very ones that said the things that lead*

> *them to pose the question*, "What is the difference between Jurassic Park and the Geologic Division in the Geological Survey?" And you've probably heard the answer. The answer is, "One is an amusement park filled with dinosaurs and the other is a movie." *So, those of you in my generation in the Geologic Division, take that.*

(emphasis added). In Reston, Dr. Eaton repeated the "Jurassic Park" joke. Plaintiffs contend that Dr. Eaton's "dinosaur comments" indicate stereotyping of older employees as resistant to change and express Dr. Eaton's desire to replace these older employees with younger employees.

In addition, in March, 1995, at the beginning of the RIF process, all employees of the geologic division were advised to attend a briefing "about the coming reductions in force." *Id.*, Ex. E. The notice announcing the briefing included a one-panel cartoon of a dog, holding a piece of paper and speaking to a larger dog while an obviously older dog sits in the corner reading a newspaper. The caption on the cartoon reads, "You gotta help me, Mom. . . . This assignment is due tomorrow and Gramps doesn't understand the new tricks." *Id.* This cartoon appears to be a reference to the cliche, "you can't teach an old dog new tricks." Plaintiffs contend that it is susceptible to the inference that those implementing the RIF would be biased against older employees because of their perceived reluctance to adjust to changes in the workplace.

Last, as evidence that the RIF was implemented with discriminatory intent, Plaintiffs proffer a memorandum outlining the "Ground Rules for Reduction in Force" written by Chief Geologist P. Patrick Leahy and distrib-

uted on June 19, 1995. *Id.* Ex. E. In this memo, Leahy details the policies he established within the statutory and regulatory context of an RIF. With respect to assignment rights (bumping rights), Leahy decided that no assignment rights would be permitted "beyond those required by law and regulation." *Id.* Ex. E. at 2. Leahy recognized that he had the discretion to grant assignment rights in a manner "that would expand bumping rights for most Division employees." *Id.*, at 4. He chose not to adopt this position, in part, because the "[e]mployees with least seniority would be most vulnerable to downgrading or separation. As a result, the remaining staff would include most of our highly experienced senior scientists, but many of the younger more recently trained staff would be lost." *Id.* Therefore, while "acknowledging that [the chosen bumping policy] denies senior staff an advantage we could have granted them," Leahy limited those employees' bumping rights. *Id.*

Defendant argues that Plaintiffs' evidence amounts to nothing more than "stray remarks" insufficient to raise an inference of discriminatory animus. *See Coleman*, 232 F.3d at 1284 (question of fact as to whether one manager described individual as "young and promotable" not sufficient to raise a material dispute with respect to whether employer's nondiscriminatory rationale was a pretext). In this context, Defendant's argument is unpersuasive. Plaintiffs have presented more than a single isolated comment "uttered in an ambivalent manner and not tied directly to the termination." *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993). Rather, they have presented sufficient evidence from which a factfinder could conclude that decision-makers in the agency, and particularly those involved in formulating and implementing the RIF, articulated a prohib-

ited, discriminatory animus. "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Godwin*, 150 F.3d at 1221; *see also Lindahl*, 930 F.2d at 1438 ("plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact").[1]

The evidence detailed above satisifes Plaintiffs' burden under *McDonnell Douglas*. They have presented sufficient evidence to create a material dispute concerning Defendant's motivation in taking the adverse employment action.

b) Pretext

Because Plaintiffs have satisfied their burden at this stage of the *McDonnell Douglas* analysis by presenting sufficient evidence of discriminatory motive, they need not present "specific, substantial evidence" of pretext as well. *See supra Nidds*, 113 F.3d at 918 (to withstand summary judgment, the plaintiff "must produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for Nidds' discharge was false or (b) that the true reason for his discharge was a discriminatory one"). Nevertheless, Plaintiffs also argue that Defendant's contention that the RIF was legitimate and nondiscriminatory is not worthy of credence.

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[1] Defendant also argues that, viewed in context, Dr. Eaton and others in management were encouraging employees of the USGS to change "in order to meet the agency's changing missions and societal needs." Defendant's Reply at 3. Although Eaton's comments are susceptible to this interpretation, Plaintiffs have presented sufficient evidence from which a factfinder could infer discriminatory animus.

In arguing that the RIF was a pretext for discrimination, Plaintiffs have focused specifically on the cases of Csejtey, Ford, Grantz, and Wrucke. The essence of the arguments made by these Plaintiffs is that they were qualified for their positions, and their separation from employment during the RIF was unjustified and constitutes evidence of pretext. These claims are not sufficient to establish pretext. *See Casillas v. Navy*, 735 F.2d 338 (9th Cir. 1984) (Title VII does not ensure that the best candidate is chosen, only that the selection process is free of discrimination).

Plaintiff Csejtey also contends that although Defendant claims the project he was working on was terminated, in fact, an identical project was implemented during the RIF. However, the evidence in the administrative record indicates that the new project was dissimilar and the location of the project was moved to Alaska. AR 21314-21361.

Plaintiff Wrucke contends that Defendant placed him in the wrong "competitive level code" (CLC) and that this erroneous CLC led to this separation. However, the record indicates that the CLC sought by Wrucke was dissimilar to his current duties.

B. Disparate Impact

1. Legal Standard

In order to state a prima facie disparate impact claim, plaintiffs must show "that a facillay neutral employment practice has a 'significantly discriminatory' impact upon a protected class." *See Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1986) (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)). The prima facie case has three elements. The

plaintiff must 1) show a significant disparate impact on a protected class or group, 2) identify the specific employment practices or selection criteria at issue, and 3) show that the disparity is linked to the challenged policy or practice. *Hemmings v. Tidyman's Inc.*, —F.3d—, 2002 WL 537689 at *11 (9th Cir. 2002) (citing *Antonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1482 (9th Cir. 1987)). If the employee establishes a prima facie case of disparate impact, the burden shifts to the employer to prove that the challenged practice is job-related for the position an consistent with business necessity. If the employer meets its burden of showing "business necessity," the burden shifts back to the employee to show that the same goal could be accomplished with less adverse impact upon the protected class. *Coleman*, 232 F.3d at 1291.

2. Statistical Evidence

Defendant contends that Plaintiffs have failed to satisfy two of the three criteria necessary to establish their prima facie case.

First, Defendant argues that Plaintiffs failed to identify in their pleading the "specific, identified employment practice or selection criteria" responsible for the disparty. *Stout v. Potter*, 276 F.3d 1118, 1121 (9th Cir. 2002). However, as the Supreme Court recently held in the related context of disparate treatment, the burden of establishing a prima facie case "is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Soreman*, 122 S. Ct. 992, 997 (2002). Title VII and ADEA violations are sufficiently plead if the complaint alleges that the plaintiff was "terminated . . . on account of his age, detail[s] the events leading to the termination, provide[s] relevant dates, and include[s] the

ages . . . of at least some of the relevant persons involved. . . . " *Id.* at 999.

This standard was met in the present case, and the relevant question at this stage in the proceeding is whether Plaintiffs have submitted sufficient evidence that a specific employment practice was responsible for the alleged disparate impact on the protected class. Plaintiffs have sufficiently identified the policies and practices within the RIF that they contend had a disparate impact. These policies include, but are not limited to, the narrowing of competitive level codes, the limiting of assignment rights, and the use of "add back" lists. Based on this evidence, the Court concludes that Plaintiffs have satisfied the second requirement of a prima facie case: they have identified specific employment practices that they claim have had a disparate impact on the protected class. The statistical disparity, moreover, is significant enough to raise an inference of causation. AR 11959, 11964; *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-96 (1988)).

Defendant also argues that Plaintiffs have not satisfied their prima facie case because the statistical evidence they presented is so flawed that is it insufficient to establish a disparate impact on the protected class. Specifically, Defendant contends that Plaintiffs' statistical analysis failed to account for several relevant factors.[2] In support of this contention, Defendant relies on

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[2] Defendant also contends that Plaintiffs' statistical sample was too small. *See Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) ("the probative value of any statistical comparison is limited by the small available sample"). In *Stout*, however, the data set consisted of thirty-eight applicants for five positions. In the present case, Plaintiffs compared

Coleman v. Quaker Oats Company, where the plaintiffs presented statistical evidence suggesting that twice the percentage of employees over the age of forty were laid off during a RIF as those under the age of forty. 232 F.3d at 1281. The court, however, found the plaintiffs' statistics unreliable because they did "not take into account any variable other than age." *Id.*

In this case, Defendant argues that Plaintiffs' statistical analysis is equally unreliable because it failed to consider the factors of grades, length of service and performance. However, Defendant "cannot defeat [a statistical] showing of discrimination simply by pointing out possible flaws in [the] data. Rather, [the defendant] had to produce credible evidence that curing the alleged flaws would also cure the statistical disparity." *Equal Employment Opportunity Comm'n v. Gen. Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 582-83 (9th Cir. 1989); *see also Coleman*, 232 F.3d at 1281 (when other variables were considered the results were "far less dramatic" and "not even significant"). Defendant has not produced such evidence in support of this motion. Instead, Defendant relies on the conclusions reached by the ALJ at the MSPB hearing. The ALJ credited the testimony of Defendant's expert over that of Plaintiffs'. The ALJ, however, did not find that Plaintiffs' statistical showing was insufficient as a matter of law—the showing required of Defendant to succeed on this motion for summary judgment. Rather, after reviewing the reports and testimony of both Plaintiffs' and Defendants's experts, the ALJ concluded, "I find the [Plaintiffs'] statistical evi-

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the 550 positions eliminated to the total workforce of approximately 2000 employees.

dence less persuasive than the testimonial and statistical evidence provided by the agency." AR 17813.

To satisfy the prima facie case in a disparate impact case, "the law does not require the near-impossible standard of eliminating all possible nondiscriminatory factors." *Hemmings*, 2002 WL 537689 at *9. Rather, so long as Plaintiffs' analysis is not "so incomplete as to be inadmissible as irrelevant," *see Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986), complaints about the" inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility." *Hemmings*, 2002 WL 537689 at *9. Defendant has not shown that the inclusion of factors allegedly omitted by Plaintiff's statistical expert would eliminate the age-based statistical disparity. Consequently, Plaintiffs' and Defendant's conflicting statistical evidence must be presented to the factfinder.

Defendant also contends that it has presented evidence of a "business necessity" that is unrebutted by Plaintiff. Specifically, Defendant contends that "the goals of saving money and meeting the changed mission of the agency could [not] have been met by any means other than by the RIF." Reply Brief in Support of Defendant's Motion for Summary Judgment at 6. However, Defendant has failed to satisfy its burden of showing why the means used in the RIF were necessary, not simply that the RIF was a necessity.

C. Individual Claims

In addition to the age discrimination claim common to all Plaintiffs, several Plaintiffs also bring claims of discrimination based on factors other than age. Plaintiff Wrucke alleges discrimination on the basis of his veteran status. Plaintiffs Adam, Lewis, Lindh, and Turrin

allege retaliation under Title VII. Plaintiffs Csejtey, Iyer, and King allege national origin discrimination. And, Plaintiff David alleges discrimination on the basis of sex.

The Court grants Defendant's motion for summary judgment on Plaintiff Wrucke's veteran's rights claim because veterans are not a protected class under Title VII or the ADEA.

The Court grants Defendant's motion for summary judgment with respect to Plaintiffs Lewis, Lindh, and Turrin's retaliation claims. In order to state a claim for retaliation under Title VII or the ADEA, the plaintiff must allege that he or she engaged in activity protected by Title VII or the ADEA. Plaintiffs Lewis, Lindh and Turrin contend that they were retaliated against for whistle blower complaints unrelated to Defendant's alleged violations of Title VII or the ADEA. Consequently, their claims for retaliation are not viable as a matter of law.

Plaintiff Adam contends that he was laid off during the October 15 RIF, in part, as reprisal for a letter he had written in 1985 supporting a grievance filed by a female co-worker. Plaintiff Adam has failed to establish a causal connection between the 1985 letter and the 1995 separation. He therefore has not established a prima facie case of retaliation. *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997) (prima facie case of retaliation requires a showing of a causal link between the protected activity and the employer's adverse action).

Defendant's motion for summary judgment is granted with respect to Plaintiffs Csejtey, Iyer, and King's national origin discrimination claims. Although Plain-

tiffs have established a prima facie case, they have not come forward with evidence to show that the RIF was a pretext for national origin discrimination. The evidence supporting Plaintiffs' age discrimination claims is not probative of national origin discrimination and Plaintiffs have not presented evidence from which a trier of fact could choose to disbelieve Defendant's legitimate, non-discriminatory explanation for their separation. For the same reason, Defendant is entitled to summary judgment on Plaintiff Davis' sex discrimination claim.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted in part and denied in part (Docket #142). There is a disputed question of material fact with respect to whether Defendant intentionally discriminated against employees over the age of forty when it designed and implemented the October 15, 1995 RIF. There is also a dispute of material fact with respect to whether the RIF had an impermissible disparate impact on a protected class of employees over the age of forty.

Summary judgment in [*sic*] granted with respect to Plaintiffs Hirshorn and Turrin's age discrimination claims because they were not in the protected class at the time of the RIF. Summary judgment is also granted on Plaintiffs Lewis, Lindh, Turrin and Adam's retaliation claims, Plaintiff Wrucke's veteran's rights claim, Plaintiff Davis' sex discrimination claim and Plaintiffs Csejtey, Iyer and King's national origin discrimination claims.

Dated: [May 31, 2002]

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 98-02094

DAVID P. ADAM, LANDFORD H. ADAMI, JAMES P. CALZIA, BELA CSEJTEY, JR., ALICE S. DAVIS, JAMES L. DRINKWATER, ARTHUR GRANTZ, BARRY F. HIRSHORN, H. MAHADEVA IYER, CHIRON-YU KING, STEPHEN L. LEWIS, ALLAN G. LINDH, DENNIS M. MANN, A. THOMAS OVENSHINE, BRENT D. TURRIN, CHESTER T. WRUCKE, PLAINTIFFS

v.

GALE A. NORTON, SECRETARY, U.S. DEPARTMENT OF INTERIOR, DEFENDANT

[May 17, 2001]

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING PLAINTIFF'S RULE 56(F) REQUEST, AND DENYING MOTIONS TO STRIKE

Defendant Gale A. Norton, Secretary of the United States Department of Interior, moves for partial summary judgment on Plaintiffs' Civil Service Reform Act (CSRA) claims and moves to dismiss Plaintiffs Hirshorn and Turrin's claims. Plaintiffs oppose this motion. Before the Court is Plaintiffs' complaint for judicial review of the decision of the Merit Systems Protection Board

(MSPB) that they were properly separated from the Geological Division (Division) of the United States Department of the Interior (Agency) and that their positions were properly downgraded as a result of the Agency's 1995 reduction-in-force (RIF).

On April 23, 1999, Defendant filed a motion for partial summary judgment on Plaintiff Adam's CSRA claims, and Plaintiff Adam filed a cross-motion for partial summary judgment. Rather than rule on these motions, the Court ordered Defendant to file a motion for summary judgment raising "all claims" that she believed were not subject to a genuine dispute of material fact and about which the other side "could, with due diligence, have completed sufficient discovery to oppose by the date the opposition is due." In compliance with this order, on January 27, 2000, Defendant filed a motion for partial summary judgment on all of the Plaintiffs' CSRA claims. Defendant also moved to dismiss all of Plaintiffs Hirshorn and Turrin's claims. On May 12, 2000, Plaintiffs opposed this motion, although they did not file a cross-motion for partial summary judgment. Plaintiffs also requested relief pursuant to Federal Rule of Civil Procedure 56(f). Defendant filed a reply. Plaintiffs then filed a surreply, which was improper because they had not filed a cross-motion. However, rather than strike Plaintiffs' surreply, the Court allowed Defendant also to file a surreply. The parties also filed motions to strike various portions of the pleadings and declarations filed in support of and opposition to Defendant's January 27, 2000 motion for partial summary judgment.

The matter was heard on September 29, 2000. The Court has considered all papers filed in response to the briefing schedule set forth in the October 5, 1999 Order,

including both parties' Motions To Strike and surreplies, and oral argument on motion. The Court GRANTS Defendant's Motion For Partial Summary Judgment, DENIES Plaintiffs' Motion for Relief Pursuant to Rule 56(f), and DENIES the motions to strike filed by both parties. Further, the Court denies as moot the parties' earlier cross-motions for partial summary judgment, which were superseded by the present motion.

STATEMENT OF FACTS

I. General Background

In the mid-1980s, the Division began to have financial problems because its budgets did not keep pace with increasing inflationary costs. In 1991, after years of financial difficulties with Congressional budget cuts and escalating costs, the Division received significantly less funding and its financial difficulties became more acute. The Division instituted measures to address the funding crisis, including a hiring freeze, termination of temporary appointments, offers of early retirement and buyouts. *See* Administrative Record (AR) at 15321. Despite these efforts, the Division continued to suffer financial difficulties. From 1992 to 1994, the Chief Geologist circulated various memoranda within the Division about the need to reduce staffing. Ultimately, in October, 1995, the Division conducted a RIF in which 550 scientists, approximately thirty-seven percent of its workforce, including Plaintiffs, were separated from federal service or downgraded.[1] As provided by 5 U.S.C.

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[1] Plaintiff Allan G. Lindh was not separated from service but his position was downgraded from a GS-15 Geologist to a GS-12 Geologist. *See* AR 31115. Plaintiff Dennis Mann continues to work for the Division

§§ 7702, 7703, in November, 1995, Plaintiffs sought review with the MSPB of their separations.

II. The MSPB Decision

The MSPB hearing included ninety-one days of testimony and generated 175 volumes of record. The MSPB Judge wrote separate opinions for each Plaintiff, a total of seventeen. Ultimately, the MSPB Judge found that the Division had bona fide financial and reorganizational reasons for the 1995 RIF. Furthermore, the MSPB Judge concluded that the RIF was carried out in accordance with CSRA standards and that each Plaintiff was either properly separated from federal service or properly downgraded to another position.

During the MSPB review of their separation from federal service, Plaintiffs claimed that Defendant unlawfully discriminated against them based on age, sex, national origin, and/or race, and/or retaliated against them for their opposition to unlawful discrimination, and violated their rights under the CSRA. Plaintiffs made identical claims challenging the validity of the 1995 RIF as a whole and made claims specific to their individual employment situations.

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following his settlement of his RIF claims during administrative proceedings. *See* Decl. of Mary Beth Utti In Opposition to Pl.s' Motion To Amend Complaint, C1 and C2.

DISCUSSION

I. Motion For Partial Summary Judgment

A. Legal Standard For Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *See Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those that, under applicable substantive law, may affect [*sic*] outcome of the case. The substantive law will identify which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Legal Standard for Review of MSPB Hearing

Employees or applicants for employment who are adversely affected by a final order or decision of the MSPB may obtain judicial review of the order in the United States Court of Appeals for the Federal Circuit. *See* 5 U.S.C. §§ 7702, 7703; 5 C.F.R. § 1201.119 (1991); *id.* § 1201.120 (1998). Under 5 C.F.R. § 1201.175, the district court has jurisdiction over requests for judicial review of cases involving claims of discrimination described in 5 U.S.C. § 7702. This includes actions alleging discrimination prohibited by §§ 12 and 15 of the ADEA and Title VII of the Civil Rights Act of 1964. In addition, under §§ 7702 and 7703, the district court may review MSPB decisions in "mixed cases," defined as cases in which the underlying adverse action is appealable to the MSPB and the discrimination described in § 7702 is alleged as a basis for the adverse action. *Romain v. Shear*, 799 F.2d 1416, 1421 (9th Cir. 1986); *see Williams v. Department of Army*, 715 F.2d 1485, 1486 & n.3 (Fed. Cir. 1983).

In deciding mixed cases, district courts must review the MSPB's determination of issues other than discrimination based on the administrative record, under a deferential standard of review. *See* 5 U.S.C. § 7703(c); *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1482 (Fed. Cir. 1998); *Sloan v. West*, 140 F.3d 1255, 1260 & n.16 (9th Cir. 1998). Pursuant to 5 U.S.C. § 7703(c), district courts must affirm the MSPB's findings regarding issues other than discrimination unless a review of the record reveals that those decisions are (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) made in violation of procedures required by law, rule or regulation, or (3)

unsupported by substantial evidence. *See* 5 U.S.C. § 7703 (c). MSPB decisions on discrimination issues are reviewed *de novo*. *See* 5 U.S.C. § 7703 (c); *Sloan*, 140 F.3d at 1260 and n.16; *Morales v. Merit Systems Protection Board*, 932 F.2d 800, 802 (9th Cir. 1991); *Romain*, 799 F.2d at 1421 (explaining the difference in judicial treatment of the two types of claims in mixed cases).

C. Plaintiffs' Common Claims

Plaintiffs assert that in order for this Court to adjudicate Defendant's motion for summary judgment on Plaintiffs' CSRA claim, the Court will be required to rule on Plaintiffs' discrimination claims. This is not the case. Plaintiffs have alleged a "mixed case," with allegations of discrimination coupled with allegations of other wrongs. Therefore, the Court may properly consider Plaintiffs' claims of other wrongs based on the administrative record separately from Plaintiffs' discrimination claims, which the Court will review *de novo*. Thus, in this order, the Court will not consider any of Plaintiffs' discrimination claims, including Plaintiffs' claims that they were retaliated against for discriminatory reasons, and will rule only on Defendant's motion for summary judgment regarding whether the Division instituted the RIF and separated Plaintiffs in accordance with the CSRA.

Plaintiffs also assert that this Court should review *de novo* the MSPB Judge's decision on Plaintiffs' claims of wrongs other than discrimination. However, as explained above, Plaintiffs are mistaken.

1. Division's Financial Reasons for RIF

Plaintiffs allege that the Division's financial difficulties were "bogus" and a "spurious reason" for the reorganization and RIF because the Division's cost shifting and buyouts should have corrected its earlier financial difficulties.[2] *See* Pl.s' First Amended Complaint, 9. Plaintiffs allege that the MSPB Judge failed to consider evidence of the Agency's financial healthiness in the 1996 fiscal year, including the facts that the Agency allocated millions of dollars to contracts for equipment and/or services, that many of the employees who were not separated in the 1995 RIF received performance awards at the end of the year, and that there was a financial surplus in the Agency's Capital Fund for the 1996 fiscal year. Plaintiffs claim that the witnesses who testified about the financial problems of the Division did not give credible testimony. Furthermore, Plaintiffs dispute Defendant's claim of financial difficulties that relate back to the 1995 RIF. Lastly, Plaintiffs allege the Division's executives knew that Congress was not going to decrease its budget significantly for fiscal year 1996 and they nonetheless conducted the RIF in order to separate certain people from federal service, including Plaintiffs.

The Code of Federal Regulations sets forth the standard for a federal agency to conduct a RIF. Pursuant to 5 C.F.R. § 351.201(a)(2), a federal agency may "release a competitive employee from his or her competitive level by . . . separation . . . when release is required because of . . . shortage of funds." 5 C.F.R.

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[2] Although Plaintiffs do not distinguish between the financial healthiness of the Agency as opposed to the Division, the MSPB Judge considered the financial healthiness of the Agency as well as that of the Division.

§ 351.201(a)(2). The determination that a RIF is proper is "a matter of the agency's independent managerial discretion." *Cross v. Department of Transportation*, 127 F.3d 1443, 1447 (Fed. Cir. 1997). When conducting a RIF because of lack of funding, the agency need not wait until a shortage of funding exists but it may take the appropriate action upon becoming aware of imminent legislation which will affect its funding. *See id.*

The MSPB Judge found that the Division conducted the 1995 RIF in response to ongoing financial difficulties that were expected to further deteriorate. *See* AR 17788. The MSPB Judge reasonably relied on the Agency's financial documents pertaining to the Division and testimony of many of the Division's officials, including testimony by some Plaintiffs. Plaintiffs' claim that the MSPB Judge relied on witnesses who did not give credible testimony is unavailing. Credibility determinations made by the MSPB Judge are "virtually unreviewable." *See Hambsch v. Dept. of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986).

The MSPB Judge considered that the Division had been having financial difficulties since the 1980s, that these problems became increasingly worse in the early 1990s, and that the Division had attempted to remedy its financial problems. Nevertheless, even after the 1994 buyout, the MSPB Judge noted that the Division found a RIF essential to its economic survival. *See* AR 15321-23. Thus, the MSPB Judge reasonably concluded that there were bona fide financial reasons for the RIF. *See* AR 17788.

2. Procedures Used in the Reorganization

Chapter 5 Code of Federal Regulations Section 351.201(a)(l) provides,

> Each agency is responsible for determining the categories within which positions are required, where they are located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

5 C.F.R. § 351.201(a)(1). Federal agencies hold the power to make determinations about the retention or elimination of positions within them. *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984). When conducting a RIF, the federal agency establishes competitive levels in which employees compete for retention by the agency in accordance with 5 C.F.R. § 342.5403(a), which provides,

> (1) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption. (2) Competitive level determinations are based on each employee's official position not the employee's personal qualifications.

Plaintiffs allege that certain managerial positions were created as sham positions to protect some managers from being separated during the RIF, that the Divi-

sion improperly returned some managers to science or research positions, and that managers were able to retain positions improperly without regard to programmatic needs. Plaintiffs claim that the managers improperly influenced the staffing plans. Plaintiffs also allege that the managers had improper influence over the subject matter experts (SMEs). The SMEs' role was to meet with personnel officials to determine the interchangeability of positions and to determine which employees would be assigned to the positions that the Division planned to retain after the RIF. Plaintiffs claim that the SMEs were not qualified and that they improperly destroyed their notes. Lastly, Plaintiffs allege that the Division improperly created competitive levels that were overly narrow in order to target certain individual scientists to be separated.

Defendant counters that the RIF was effectuated according to proper procedures, as set forth in 5 C.F.R. § 351.201(a)(1). Defendant asserts that the Division developed and implemented its reorganization and RIF as follows: by developing the general priorities of the Division, including developing five-year plans of its scientific goals, developing staffing plans in accordance with those priorities, reviewing all position descriptions to assess which, if any, were the best match for the identified needs, and setting up a multi-level review and oversight process. Defendant asserts that every abolished position was discussed during the review process in an attempt to place it with one of the Division's programs. Defendant also argues that although managers were involved in the development of staffing plans, reviewed changes made to position descriptions, and made recommendations on which positions were retained, there is no

evidence that managers exerted improper influence over the SMEs. Defendant argues that the SMEs were qualified and were not required to retain their notes. Lastly, Defendant argues that the competitive levels were properly developed in accordance with 5 C.F.R. 351.403(a).

In considering the process the Division followed in developing its reorganization plan, the MSPB Judge noted that Division officials were given a directive from then-Secretary of the Interior Bruce Babbitt that "the Agency needed to change." AR 17790. The MSPB Judge found that the Administrative Record includes evidence that the Division reorganized in two ways—streamlining management organization and realignment of programs.

The MSPB Judge agreed that the Division developed its reorganization plan by determining the Division's general goals and missions, developing science plans for ten scientific programs, developing and implementing staffing plans, and utilizing the multi-level review process. The Division's officials determined the general goals and missions of the Division by having SMEs and Division managers meet to consider them. Then the Division determined what scientific endeavors it would attempt to pursue in a five-year period. The Division prepared five-year plans which laid out its scientific goals. From these five-year plans, Program Councils were formed, which were comprised of the Program Coordinator and Branch Managers. The Program Councils then developed generic staffing plans, consisting of the types of positions needed to execute the program, reviewed the position descriptions relevant to that program, and determined which positions were the best match for the identified needs. The Division conducted

two independent reviews of its staffing plans, one by the Division Program and Staffing Plan Review Committee and one by upper level management and program coordinators, to ensure the plans adequately reflected the future of the Division and to determine if some positions identified for separation could be utilized in other areas. *See* AR 919, 15292-93, 17792, and 17380.

The MSPB Judge determined that the Division's decision to return all managers on rotational management assignments to their original science or research positions was proper. AR 17791. He concluded that the Division developed its reorganization plan properly. The Court finds that the MSPB Judge's conclusion was not arbitrary and capricious.

The MSPB Judge rejected Plaintiffs' claim that managers had an undue influence on the staffing plans and noted that there was a consensus decision-making process, with input from employees at all levels, in the development and implementation of the staffing plans.

The MSPB Judge also rejected Plaintiffs' arguments that the SMEs were unduly influenced by the managers, were not qualified, and improperly destroyed their notes. The MSPB Judge concluded that there was no evidence that the managers "could, or did, overwhelm the free will of the SMEs." AR 17793. He considered the testimony of numerous SMEs and concluded that they were "assertive and confident of their expertise, judgment and status." *Id.* The MSPB Judge determined that there is no support in law or regulations for Plaintiffs' argument that all of the SMEs' notes should have been preserved or that the SMEs' handwritten notes which were later reduced to formal record should have been preserved. The MSPB Judge's conclusions

were reasonable. *See Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (finding that appointment calendars and telephone slips are not agency records under the Freedom of Information Act); *Judicial Watch Inc. v. Clinton*, 800 F. Supp. 1 (D.C.C. 1995) (personal staff notes are not agency records under the Freedom of Information Act). Plaintiffs cite no law to the contrary.

Lastly, the MSPB Judge considered the Division's procedures for determining competitive levels. The MSPB Judge noted that he did not find any evidence of a large scale conspiracy in developing competitive levels, which would have been necessary in order illegally to [*sic*] manipulate the Division's reorganization and RIF that affected thousands of people nationally. *See* AR 17795. John McGurk, former Human Resources Officer for the Division, testified that the competitive level system was revised to conform with the requirements of 5 C.F.R. § 351.403 (a)(2) and explained the process in detail. First, the Division asked employees to review their position descriptions and update them to reflect their current positions. The Division then modified competitive levels in accordance with the specific position descriptions filled out by the employees. Mr. McGurk explained that, thereafter, a panel of SMEs reviewed the employees' position descriptions, compared those position descriptions within the same competitive area for consistency, and then made RIF recommendations. *See* AR 15973. Finally, these recommendations were reviewed by the validation team: all branch managers, the RIF Coordinator and the classification specialists. *See* AR 15976-77.

The MSPB Judge also noted that the Division submitted its competitive level revision process, including its use of single position competitive levels, to the Office of Personnel Management (OPM) for its guidance. *See* AR 17796. OPM found that the use of single position competitive levels was appropriate. AR 17796.

Furthermore, the MSPB Judge noted that Dean Anderson, who served as a Supervisory Personnel Classification Specialist, explained the construction of narrow competitive levels for research scientists. According to Mr. Anderson, research science requires creativity and originality, and research scientists largely define their own career tracks through increasing specialization. He pointed out, "It is not surprising that there is limited interchangeability." AR 17797. Moreover, Mr. Anderson explained that "federal agencies who have a large number of research scientists have similar narrow competitive levels." AR 17797.

The MSPB Judge also determined that, under the pre-RIF system, over eighty-five percent of the competitive levels for scientist or researcher positions were single position levels. *See* AR 1779. Furthermore, he determined that pre-RIF positions designated for more than one person "generally only included a few other people." AR 17795. The MSPB Judge decided that the Division's procedures for determining competitive levels was proper, and his decision was not arbitrary and capricious.

Again, although Plaintiffs dispute the credibility of some of the witnesses, there is very little, if any, evidence in record supporting their assertions or undermining the "virtually unreviewable" discretion of the MSPB Judge to make decisions about credibility.

Hambsch v. Dept. of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986).

In sum, the MSPB Judge reasonably concluded that the Division had bona fide reasons for its reorganization. He reasonably decided that the Division properly developed and implemented the reorganization and RIF, and that the SMEs were independent and qualified, and were not required to retain their notes. He reasonably determined that the Division properly determined the competitive levels. He considered the correct laws and regulations. *See* 5 U.S.C. § 7703(c). There is substantial evidence in the record supporting his conclusions; his decision was not arbitrary and capricious. *See id.* Accordingly, the Court affirms the MSPB Judge's rulings on Plaintiffs' common claims.

D. Plaintiffs' Individual Claims

The Court has reviewed the MSPB Judge's decision regarding each Plaintiff and will not restate his rationale for all of the Plaintiffs' claims specific to their separation. Rather, the Court will address the claims raised by Plaintiffs in the aggregate and identify the evidence in support of the MSPB Judge's decision.

1. Exemption From RIF

Plaintiff Overshine alleged that he had a private agreement with the Agency that exempted him from the RIF. The MSPB Judge found no provision in the RIF regulations that allows a private agreement between an Agency official and an employee to exempt the employee from the RIF. Plaintiff Overshine has not cited such a regulation. Therefore, the MSPB Judge reasonably con-

cluded that Plaintiff Overshine was not exempt from the RIF.

2. Competitive Levels

Plaintiffs alleged that their competitive levels were improperly established.[3] As discussed above, the MSPB Judge rejected the Plaintiffs' generalized complaints of error regarding the Division's construction of the competitive level system. In addition, the MSPB Judge rejected each Plaintiff's individual claim that his or her own competitive level was too narrow and determined that all of these allegations failed as a matter of law for the following reasons: (1) other positions Plaintiffs argued should have been included in their competitive levels were in a different grade,[4] *see* C.F.R. § 351.403(a)(1) (competitive levels are made up of positions in the same grade), and (2) Plaintiffs were not correct in asserting that their competitive levels should include the same positions as the pre-1995 competitive level system,[5] and the duties of the positions Plaintiffs wanted to include in their competitive levels were too dissimilar,[6] *see* 5 C.F.R. § 351.403(a)(1) (competitive levels are made up of positions which are similar enough in duties). Some Plaintiffs also asserted that their competitive levels were established improperly because they were improperly discriminated against or retaliated against for discriminatory reasons. As discussed above, the Court will

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[3] The following Plaintiffs claimed that their competitive levels were too narrow: Adam, Adami, Calzia, Csejtey, Davis, Ford, Grantz, Hirshorn, Iyer, Lindh, Turrin and Wrucke.

[4] Plaintiffs Adam, Davis and Hirshorn.

[5] Plaintiffs Calzia, Ford and Wrucke.

[6] Plaintiffs Csjtey, Ford, Hirshorn, Iyer, Turrin and Wrucke.

not consider on this motion any of Plaintiffs' claims of discriminatory treatment.

3. Competitive Area

Plaintiff Adam alleged that his competitive area should have been the national program of the branch to which he was assigned rather than the regional unit and, therefore, his position should not have been abolished.

The MSPB Judge rejected this claim, finding that Plaintiff Adam's competitive area met the requirements of 5 C.F.R. § 351.402(b) because it consisted of "an activity under separate administration with the local commuting area." 5 C.F.R. § 351.402(b). The MSPB Judge was not incorrect in rejecting Plaintiff Adam's competitive area claim.

4. Transfer of Function To Another Competitive Area

Chapter 5 C.F.R. § 351.202 provides that when there is a transfer of any or all functions from one competitive area to another made in connection with a RIF, all employees whose functions were transferred must be transferred with their functions to the new competitive area. *See* 5 C.F.R. § 351.302.

The Code of Federal Regulations defines a transfer of function as the movement of work from one competitive area to another. *See* 5 C.F.R. § 351.203. A "function" is a clearly identifiable activity of the agency which consists of substantial authorities, powers, and duties authorized by law which combine to form a segment of the agency's mission. *See* 5 C.F.R. § 351.203; *see also Former Community Services Administration Employees v. Department of Health and Human Services*, 21

M.S.P.R. 257, 262 (1984). Section 151.301(b) provides that:

> In a transfer of function, the function must cease in the losing competitive area and continue in an identical form in the gaining competitive area (i.e. in the gaining competitive area, the function continues to be carried out by competing employees rather than by noncompeting employees).

5 C.F.R. § 351.301; *see also Hayes v. Department of Health and Human Services*, 829 F.2d 1092, 1096 (Fed. Cir. 1987); *Hasler v. Department of the Air Force*, 48 M.S.P.R. 207, 211 (1991). However, the movement of duties from one competitive area to another does not constitute a transfer of function. *Walsh v. Environment Protection Agency*, 25 M.S.P.R. 460, 465 (1984) (a transfer of function occurs when functions as opposed to duties are moved from one competitive area to another). In order to have a right to transfer with a function, an employee must show that the function was transferred to a different competitive area and that the entity that received the transfer was not already performing that function. *See* 5 C.F.R. § 203; *see also Hayes*, 829 F.2d at 1096 ("Under this regulation, a transfer of function occurs only when a function is transferred to another competitive area and the gaining area undertakes a class of activity it did not previously perform").

Some Plaintiffs allege that their positions were not abolished, but instead the functions of their positions were transferred to a different competitive area and, therefore, they should have been allowed to transfer to that area.[7] Defendant counters that no function was

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[7] Plaintiffs Adam, Calzia, Csejtey, Ford and Hirshorn.

transferred to an area where it did not previously exist and, therefore, that no transfers of function took place under 5 C.F.R. § 301.203.

The MSPB Judge found meritless all of Plaintiffs Adam, Calzia, Csejtey, Ford and Hirshorn's claims that the Division transferred the functions of their positions without transferring them, because in each case the function allegedly transferred previously existed in the transferee competitive area. Therefore, the MSPB Judge reasonably concluded that the Division did not transfer the function of these Plaintiffs' positions without allowing them to transfer, and that Plaintiffs Adam, Calzia, Csejtey and Ford had no right to transfer with the duties of their positions.

5. The Division's Bump and Retreat Policy

Chapter 5 C.F.R. § 351.701 provides [*sic*] the "bump and retreat" standard applied [*sic*] when a federal agency conducts a RIF. Section 351.701 requires that the retreating employee be qualified for the retreat position, be in the same competitive area as the retreat position, have the same work schedule as the retreat position, and retreat to the same or essentially same position as he or she held before. *See* 5 C.F.R. § 351.701(a) and (c)(3); *Parkhurst v. Department of Transportation*, 70 M.S.P.R. 309, 311 (1996). Furthermore, under 5 C.F.R. § 351.701(b), the retreating employee can bump "another employee in a lower tenure group" as long as that person is "no more than three grades below" the released position. 5 C.F.R. § 351.701(b).

Sixteen of the Plaintiffs claim that the Division should have allowed them to "retreat" into another posi-

tion instead of separating them from federal service.[8] *See* Pl.s' First Amended Complaint, 7. Plaintiff Overshine also claims that he was improperly bumped from his position by Dr. Piper.

The MSPB Judge concluded that the Division's actions were proper under § 351.701 with regard to Plaintiffs' alleged bump and retreat violations. The MSPB Judge found that there were justifiable reasons specific to each Plaintiff as to why he or she could not retreat into other positions. These reasons included that: 1) some Plaintiffs wanted to retreat to a position that was not "essentially identical" to the released positions,[9] 2) some Plaintiffs were not qualified to assume the duties of the retreat position without undue interruption,[10] 3) some Plaintiffs' released positions were lower in standing than the positions to which they wanted to retreat,[11] 4) some Plaintiffs' released positions were not the same type of work schedule (e.g., full-time, part-time, seasonal, etc.) as the position to which they wanted to retreat,[12] 5) some Plaintiffs wanted to retreat to va-

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[8] Plaintiffs alleging bump and retreat violations are: Adam, Adami, Calzia, Csejtey, Davis, Drinkwater, Ford, Grantz, Hirshorn, Iyer, King, Lewis, Lindh, Overshine, Turrin and Wrucke.

[9] The MSPB Judge found this rationale barred bump and retreat for each of the following Plaintiffs: Adam, Adami, Csejtey, Davis, Drinkwater, Ford, Grantz, Iyer, King, Hirshorn, Lewis and Turrin.

[10] The MSPB Judge found this rationale barred bump and retreat for each of the following Plaintiffs: Calzia, Csejtey, Davis, Drinkwater, Ford, Hirshorn, Iyer, King, Lewis, Turrin and Wrucke .

[11] The MSPB Judge found this rationale barred bump and retreat for Plaintiffs Adam and Calzia.

[12] The MSPB Judge found this rationale barred bump and retreat for the following Plaintiffs: Calzia, Lewis and Lindh.

cant positions that the Division did not plan to fill[13] and 6) one Plaintiff was properly bumped from his position.[14]

First, in determining whether a position was "essentially identical," the MSPB Judge reasonably found that a "position is essentially identical to one previously held if the two positions would properly be placed in the same competitive level." AR 17803. *See Parkhurst*, 70 M.S.P.R. at 312. In *Parkhurst*, the MSPB Judge laid out the criteria for determining when a released position is "essentially identical" to the position retreated to and the standard for determining whether two positions should be in the same competitive level. *Id.* First, the *Parkhurst* MSPB Judge held that the competitive level determination "depends on the duties and qualifications set forth in the position descriptions." *Id.* Furthermore, in *Parkhurst*, the MSPB Judge found that "positions belong in the same competitive level if they are in the same grade and classification series, and are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully perform the critical elements of any other position upon entry into it without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee." *Id.* Here, the MSPB Judge held that where the released position and the retreat position were not "essentially identical," retreat is prohibited. Therefore, because the MSPB Judge determined that each of the nine

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[13] The MSPB Judge found this rationale barred bump and retreat for each of the following Plaintiffs: Adam, Grantz, Lewis, Overshine and Turrin.

[14] The MSPB Judge found that Plaintiff Overshine was properly bumped.

Plaintiffs alleging a right to retreat was released from a position that was not "essentially identical" to the position to which he or she wanted to retreat, the MSPB Judge reasonably concluded that these Plaintiffs have no right to retreat.

Second, the MSPB Judge properly relied on Chapter 5 C.F.R. § 351.702(a)(1)-(4) in determining whether Plaintiffs were qualified to assume other positions without undue interruption. In order to retreat to a position, § 351.702(a)(1)-(4) provides that the employee must meet the following requirements:

(1) meets the OPM standards and requirements for the position,

(2) is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position,

(3) meets any special qualifying condition which the OPM has approved for the position, and

(4) has the capacity, adaptability, and special skills needed to satisfactorily perform the duties of the position without undue interruption. This determination includes recency of experience, when appropriate.

5 C.F.R. § 351.702(a)(1) -(4). *See Vigil v. Department of the Army*, 63 M.S.P.R. 384, 388 (1994). In defining "undue interruption," the MSPB Judge relied on the criteria set forth in *Porter v. Department of Commerce*, 13 M.S.P.R. 177, 180-81 (1982). *Porter* held that undue interruption "is a degree of interruption that would prevent the completion of required work within the allowable limits of time and quality." *Id.* The *Porter* MSPB

Judge held that "it naturally follows that any finding of undue interruption must be related directly to the nature of the particular work program to be affected. Depending upon the pressures of priorities, deadlines, and other demands, the ordinary work program probably would not be unduly interrupted if optimum quality and quantity of work were not regained within 90 days after a reduction in force." 13 M.S.P.R. at 179-80. Furthermore, the Division also may consider whether the displacement of an incumbent by retreat of another employee into his or her position would cause undue interruption. *See La Prade v. Department of Transportation*, 27 M.S.P.R. 277, 283 (1985) (finding that "an otherwise qualified employee is not entitled to exercise assignment rights to an incumbered position if the displacement would result in undue interruption").

Here, the MSPB Judge concluded that each Plaintiff claiming a right to retreat to another position was not qualified to assume that position without undue interruption. The MSPB Judge relied on the testimony of expert witnesses and some of these Plaintiffs' supervisors, and considered each of these Plaintiffs' prior work experience as compared to the required skill and knowledge of the alternative position. *See La Prade*, 27 M.S.P.R. at 283. Substantial evidence supports the MSPB Judge's conclusion that Plaintiffs could not have retreated to other positions without undue interruption.

Third, the MSPB Judge properly concluded that 5 U.S.C. § 351.701 prohibits the retreat of an employee to a position with a higher retention level. Section 351.701 states that "an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c) and (d) of this section." 5 C.F.R. §

351.701. These paragraphs provide, respectively, (1) the requirements for bumping "another employee in a lower subgroup but the same tenure group," (2) the requirements for retreating to a "position held by another employee with lower retention standing in the same tenure group or subgroup," and (3) the limitations on these processes. 5 C.F.R. § 351.701 (b), (c) and (d). These sections require that the released employee may retreat only to a position held by another employee that "is no more than three grades . . . below the position from which the employee was released . . . " *Id.* Therefore, Plaintiffs Adam and Calzia's request to retreat to a position of higher retention level was properly denied.

Fourth, the MSPB Judge properly concluded that § 351.701 prohibits the retreat of an employee to a position that does not include "the same type of work schedule." 5 C.F.R. 351.701(a). Therefore, Plaintiffs Calzia, Lewis and Lindh's request to retreat to a position with a different work schedule was properly denied.

Fifth, the MSPB Judge was correct that an employee may not retreat to a position that the Division has decided to leave vacant. Pursuant to Chapter 5 C.F.R. § 351.201(b), an agency is not required to fill a vacant position. Therefore, Plaintiffs Adam, Grantz, Lewis, Overshine and Turrin's requests to retreat to vacant positions were properly denied.

Lastly, the MSPB Judge reasonably concluded that Dr. Piper was qualified pursuant to 5 C.F.R. § 351.701(a) and (b) to bump Plaintiff Overshine from his GS-15 position.

The Court finds that there is substantial evidence to support the MSPB Judge's decisions with regard to the

bump and retreat claims of each of the individual Plaintiffs who made such claims.

E. Post-RIF Claims

Some Plaintiffs claim that Defendant failed to consider them for any vacant positions which were filled after the RIF. It is not clear whether Plaintiffs allege that Defendant violated the CSRA or discriminated against them, or both, by failing to consider them for vacant positions which were filled after the RIF.

If Plaintiffs are alleging that Defendant violated the CSRA by failing to consider them for positions filled after the RIF, the Court finds this argument to be unsubstantiated and unpersuasive. Plaintiffs do not assert that they sought out a particular position and Defendant failed to consider them. Rather, Plaintiffs assert that Defendant failed to notify them that there were positions being filled after the RIF and, therefore, failed to consider them for those positions. Plaintiffs fail to cite any law or regulation that requires a federal agency to notify a former employee who was separated during a RIF of a vacant position being filled after the RIF. Further, Plaintiffs fail to establish that any of the Plaintiffs brought a claim before the MSPB that the Division failed to consider them for a position after the RIF. Therefore, Plaintiffs' claims that Defendant violated the CSRA by failing to notify them of and consider them for positions that were filled after the RIF fails. If Plaintiffs claim that Defendant unlawfully discriminated against them by failing to notify them of or consider them for positions that were filled after the RIF, the Court will not consider such claims on this motion.

II. Motion to Dismiss Plaintiff Hirshorn and Turrin's Claims For Lack of Jurisdiction.

Defendant moves to dismiss Plaintiffs Hirshorn and Turrin's claims for lack of jurisdiction. Defendant does not specify the procedural basis for its motion to dismiss. The Court therefore treats this motion as a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Defendant claims that Plaintiffs Hirshorn and Turrin, unlike the other Plaintiffs, did not allege discrimination claims in the proceedings before the MSPB. However, these Plaintiffs did allege that the Division retaliated against them in conducting the RIF. Therefore, the Court has jurisdiction over these claims. *See* 5 U.S.C. § 7703(c); *cf Hays v. Postmaster General of the United States*, 868 F.2d 328, 329 (9th Cir. 1989) (finding that "the district court did not have jurisdiction over discrimination claims that were not raised before the MSPB at any stage of the proceeding"). Summary judgment on Plaintiffs' retaliation claims is not being considered on this motion.

III. Plaintiff Mann's Allegations

Defendant argues that Plaintiff Mann's claims regarding the RIF are barred by a March 7, 1997 settlement agreement, and that his claims that after the RIF the Division violated the CSRA by failing to consider him for vacant positions are barred because he failed to exhaust his administrative remedies pursuant to 5 U.S.C. § 7702.

Plaintiff Mann has not alleged that the Division conducted the RIF in violation of the CSRA. If he had, the allegations would be barred by the settlement agreement.

Rather, Plaintiff Mann's claims are based on actions taken against him after he was rehired. Specifically, Plaintiff Mann claims that after he was rehired, he applied for vacant positions for which he was qualified and, in violation of the CSRA, Defendant failed to consider him or canceled the position for which he had applied. Plaintiff Mann also alleges that after he was rehired, he was subjected to ridicule and retaliated against for protected activity.

Plaintiff Mann's claim for violation of the CSRA after he was rehired is barred because he failed to seek review with the MSPB in accordance with 5 U.S.C. § 7701 *et seq.* prior to filing this lawsuit. *See Romain*, 799 F.2d at 1421. As explained above, Plaintiff Mann's retaliation claim will not be addressed on this motion.

IV. Plaintiffs' Rule 56(f) Request

Plaintiffs allege that Defendant's motion for summary judgment is premature because it is not adequately substantiated by the evidence and because there has been little meaningful discovery conducted. Therefore, Plaintiffs assert that Defendant's motion for summary judgment should be denied until they have sufficient time to conduct discovery.

Defendant filed her motion for partial summary judgment on January 18, 2000. Pursuant to stipulation of the parties, Plaintiffs' opposition to Defendant's motion was to be filed on April 21, 2000. Plaintiffs did not

submit their opposition on April 21, 2000. Instead, on April 28, 2000, Plaintiffs filed an *ex parte* application for permission to file a Rule 56(f) motion, stating that Plaintiffs' counsel had been occupied with competing commitments and had experienced technical problems with her computer equipment. The Court denied Plaintiffs permission to file a Rule 56(f) motion and granted them a three week extension to file an opposition to Defendant's motion for summary judgment and a motion for further discovery, if necessary, to oppose the motion. The Court also advised Plaintiff that Rule 56(f) requires the moving party to state reasons why they couldn't "present by affidavit facts essential to justify the party's opposition," and state facts they hope to discover. Fed. R. Civ. P. 56(f); *see* May 4, 2000 Order.

"[T]he party seeking a continuance bears the burden to show what specific facts it hopes to discover that will raise an issue of material fact. The mere hope that further evidence may develop prior to trial is an insufficient basis for a continuance under Federal Rule of Civil Procedure 56(f)." *Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council, Metal Trades Dep't. AFL-CIO*, 817 F.2d 1391, 1395 (9th Cir. 1987) (internal citation omitted). To obtain a continuance, the party opposing the summary judgment motion must make clear not only what information is sought, but also how that information "would preclude summary judgment." *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (quoting *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987)).

Plaintiffs' claim that they are entitled to relief pursuant to Rule 56(f) is unsubstantiated. First, Plaintiffs have not explained why further discovery is necessary,

in view of the fact that the Court must rely on the administrative record in reviewing a MSPB Judge's decision on non-discrimination issues. Because Defendant's motion for partial summary judgment solely addresses the non-discrimination issues, this Court need not look beyond the administrative record that was before the MSPB Judge below.

Next, Plaintiffs' reliance on Magistrate Judge LaPorte's December 30, 1998 Order, which limited discovery to that necessary to bring and oppose a class certification motion, is mistaken because the December 30, 1998 Order expired long before Plaintiffs' deadline for filing their opposition to Defendant's motion for partial summary judgment. Moreover, Judge LaPorte's May 19, 1999 Order states, "The parties shall meet in person to discuss discovery and case management issues in this case and, by June 22, 1999 shall file a Joint Case Management Conference Statement outlining any issues that may be in dispute." Plaintiffs have failed to present evidence that they attempted to conduct discovery after Judge LaPorte's May 19, 1999 Order. Rather, Defendant alleges that Plaintiffs have not filed any discovery requests since January, 1999.

Lastly, even if additional discovery were necessary, Plaintiffs have failed to present specific facts they hope to discover that will raise an issue of material factual dispute. Therefore, Plaintiffs have failed to demonstrate that they are entitled to relief pursuant to Rule 56(f).

Furthermore, Plaintiffs also argue that they should be granted relief under Rule 56(f) because they have requested, to no avail, an electronic copy of the 175 volume administrative record from Defendant. However, this argument is moot because Plaintiffs' motion to com-

pel an electronic copy of the administrative record was granted in part and denied in part in the December 21, 2000 Order by Judge LaPorte.

V. Motions To Strike

Plaintiffs move to strike all references in Defendant's motion for partial summary judgment to the MSPB Judge's hearing decision, claiming that these references are not to admissible evidence. Defendant moves to strike unsupported factual references in the pleadings and declarations filed by Plaintiffs in their opposition and surreply to Defendant's motion for partial summary judgment.

Plaintiffs' and Defendant's motions to strike are both voluminous. However, although neither is entirely without merit, the Court, having considered the parties' motions to strike, finds that neither party has moved to strike evidence that both is inadmissible and necessary to the Court's disposition of Defendant's motion for partial summary judgment. The Court therefore does not offer a point-by-point analysis of the merits of the parties' motions to strike. To the extent that this order cites and relies upon evidence to which a party has moved to strike, that party's motion is denied on the merits. To the extent that a party has moved to strike evidence that is not necessary to the Court's disposition of this order, that party's objection or motion is denied as moot.

CONCLUSION

For the foregoing reasons, Defendant's Revised Motion For Partial Summary Judgment (Docket #83) is GRANTED and her Motion to Dismiss Plaintiffs Hirshorn and Turrin's claims (Docket #83) is DENIED. Defendant's Motion For Partial Summary Judgment on the CSRA Claim Regarding Adam (Docket # 52) is DENIED as moot, having been superseded by this revised motion. Defendant's motions to strike (Docket ## 102 and 111) are DENIED. Plaintiffs' Cross-Motion For Summary Judgment (Docket #63), Motion for Relief Pursuant to Rule 56(f)(Docket #63), and Motion To strike Defendant's Evidence (Docket #93) are DENIED.

Dated: [MAY 17, 2001] /s/ ILLEGIBLE
CLAUDIA WILKEN
United States District
Judge

Copies mailed to counsel
as noted on the following page

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case Number: 4:98-cv-02094

ADAM

v.

BABBITT

[May 17, 2001]

*** * CERTIFICATE OF SERVICE * ***

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 17, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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RICHARD W. WIEKING, CLERK

BY: /s/ ILLEGIBLE
DEPUTY CLERK